

United States District Court
Southern District of Texas
FILED

DEC - 2 2008

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Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

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ROGER STEVEN McCARTY,	§	
TDCJ-CID # 1276027,	§	
Petitioner,	§	
	§	
vs.	§	Civil Action No. L-07-cv-60
	§	
NATHANIEL QUARTERMAN,	§	
Director, Texas Department	§	
of Criminal Justice,	§	
Correctional Institutions	§	
Division,	§	
Respondent.	§	

MEMORANDUM AND ORDER

Pending is Petitioner's Motion to Expand the Record (Dkt. No. 54) to include his objections to the Magistrate's August 18, 2008 Report and Recommendation. Also pending is a Petition for Certificate of Appealability ("PCOA") (Dkt. No. 55).

Background

Magistrate Judge Saldaña's Report and Recommendation warned Petitioner that he had ten days from service of the Report to file any objections or he would be barred *de novo* review by the district court. He received the Report on August 20, 2008, and instead of filing any objections, he deposited a motion for extension of time to file objections into the institutional mail receptacle on August 22, 2008. The Clerk entered this motion on August 25, 2008. Judge Saldaña granted the motion in part, giving Petitioner until September 8, 2008, and warned that no

further extensions would be granted. Petitioner did not meet that deadline, and a Final Judgment was entered on September 19, 2008. (Dkt. No. 47.)

Petitioner deposited a second motion for extension of time (Dkt. No. 48) with the institutional mail receptacle on September 16, 2008, which the Clerk entered on September 19, 2008. The Court denied that motion in a Memorandum and Order dated September 29, 2008 (Dkt. No. 49).

Petitioner then deposited a Motion for Relief from Judgment on September 27, 2008 (Dkt. No. 50), entered by the Clerk on October 2, 2008, which the Court denied on October 10, 2008 (Dkt. No. 52). Petitioner has not ever filed a Notice of Appeal, but instead deposited the PCOA at the institution on October 18, 2008. It was entered by the Clerk on October 23, 2008. That petition can be construed as a Notice of Appeal. *See Victor F. v. Pasadena Indp't Sch. Dist.*, 793 F.2d 633, 634-35 (5th Cir. 1986). It also is timely filed, as it was filed within thirty days of the Court's denial of his construed Rule 59(e) motion. *See Britt v. Whitmire*, 956 F.2d 509, 511 (5th Cir. 1992).

Discussion

A. Motion to Expand the Record

Petitioner cites no authority for his Motion to Expand the Record. Rule 7 of the Rules Governing § 2254 Cases allows a

judge to "direct the parties to expand the record by submitting additional materials relating to the petition," if the petition has not been dismissed. Here, the Petition was dismissed on September 19, 2008, and Petitioner's motion to alter or amend the Final Judgment was denied on October 10, 2008. Accordingly, the motion to expand is moot insofar as it relates to the decision of this Court.

Moreover, this Court has reviewed the tendered objections and they generally add nothing new to Petitioner's prior contentions in this case. To the extent that Petitioner wants the appellate court to know what he would have said had he ever complied with established deadlines, Petitioner could furnish that information as part of his appellate brief. Furthermore, since his belated objections are now on file at Docket No. 54, they are available for viewing by the appellate court.

Petitioner's Motion to Expand the Record (Dkt. No. 54) is DENIED as moot.

B. Petition for Certificate of Appealability

Petitioner basically rehashes the same arguments raised in his Response to Defendants' Motion for Summary Judgment. These issues were adequately and correctly analyzed by Magistrate Judge Saldaña, whose findings of fact and conclusions of law were adopted by this Court. The Court again considered the

issues when it denied Petitioner's motion to alter or amend the judgment.

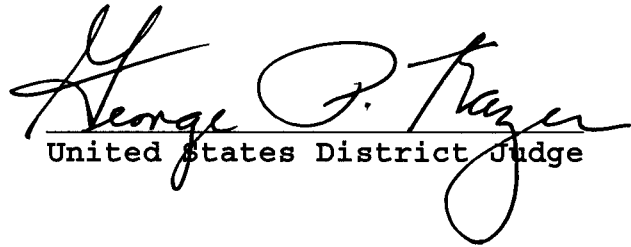
The only new issue raised in the PCOA is Petitioner's claim that he was denied due process when the Court did not grant all the extensions he requested. The Court has already stated its reasons for denying any further extensions in its Memorandum of October 10, 2008 (Dkt. No. 52).

The Court concludes that, as to the bulk of his claims, Petitioner has not "demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000). The Court will grant a Certificate of Appealability on what Petitioner has labeled "Question Six Argument" in his PCOA, namely that Petitioner was not granted sufficient extensions of time to object to the original Report and Recommendation. As to all the other claims, the Certificate of Appealability (Dkt. No. 55) is DENIED.

Conclusion

Petitioner's Motion to Expand the Record (Dkt. No. 54) is DENIED as moot. The Court GRANTS a Certificate of Appealability on what Petitioner has labeled "Question Six Argument" in his PCOA (Dkt. No. 55). As to all the other claims, the Certificate of Appealability is DENIED.

DONE at Laredo, Texas, this 2d day of December, 2008.


United States District Judge